Supreme Court, U.S.
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No. 93-977

In the Supreme Court of the United States

OCTOBER TERM, 1993

LAURA GONZALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JEFFERY T. INFELISE
Colonel, USAF
JULES D. SILBERBERG
Major, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Air Force Legal Services Agency
Bolling Air Force Base
Washington, D.C. 20332-5113

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QUESTIONS PRESENTED

1. Whether the prosecution failed to establish a proper chain of custody over a urine sample that formed the basis for petitioner's prosecution.

2. Whether the method of appointing military judges violates the Appointments Clause of the Constitution and whether the lack of a fixed term for military judges violates the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-6a) is reported at 37 M.J. 456. The opinion of the Air Force Court of Military Review (Pet. App. 7a-12a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 20, 1993. The petition for a writ of certiorari was filed on December 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. III 1991).

STATEMENT

Petitioner, a member of the United States Air Force, was convicted by a general court-martial of using cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. 912a. She was sentenced to a bad-conduct discharge and reduction to airman first class (E-3). The convening authority approved the findings and sentence, and the Air Force Court of Military Review affirmed. The Court of Military Appeals affirmed.

Petitioner was selected to participate in a unit-wide inspection for illegal drugs. Staff Sergeant Tracy Hall was ordered to observe petitioner as she provided a urine sample for drug testing. Hall testified that she recalled entering the women's room with only a wide-mouthed container, watching petitioner urinate into it, replacing the cap on the container, carrying the container back to the collection station, and giving it to Staff Sergeant Brown, a urinalysis program monitor. Hall recalled initialing the small-mouthed container in which specimens are shipped to the drug testing laboratory after it had been sealed. Although she testified that petitioner's urine was never out of her sight during the entire procedure, she did not recall how the urine was transferred from the wide-mouthed collection container to the small-mouthed shipping container. Pet. 2-3; Pet. App. 8a. Petitioner was convicted of cocaine use based on the positive result obtained from testing petitioner's urine for metabolites of cocaine. Pet. App. 2a.

At trial, petitioner objected to the admission of the urinalysis results based on an inadequate chain of custody. In addressing the question whether Hall's lack of recollection of the transfer from one container to the other destroyed the chain of custody, the military judge ruled as follows:

> Staff Sergeant Hall obviously has some difficulty remembering the details of exactly what happened in the bathroom, and remembers only a wide mouth container being taken into the bathroom.
>
> That certainly will affect the weight of her testimony, but in my mind she said three critical things. First, that she observed the accused urinate, and that that urine was under her constant super—observation. Secondly, that the urine coming from the accused's body was the urine that was ultimately placed in Prosecution Exhibit 6 [the small-mouthed container], and was the urine in [that container] when Staff Sergeant Brown sealed it, and Sergeant Hall placed her initials on it. Third, that the urine was not tampered with or altered while under her observation.

Tr. 570-571. The judge then overruled petitioner's objection to the admission of the testing evidence based on the urine sample. Pet. 3-4.

ARGUMENT

1. Petitioner argues (Pet. 8-13) that Hall's lack of recollection effectively broke the chain of custody of petitioner's urine sample prior to the time it was sealed and marked for transport to the drug testing laboratory. Accordingly, she argues, the prosecution did not establish that the urine tested was petitioner's.

The military rules of evidence apply the following standard to authentication disputes based on a challenge to the chain of custody:

> The government's burden of demonstrating an adequate chain of custody is satisfied by a showing that fungible evidence has been preserved in an unaltered state. The court must be satisfied by the govern-

> ment's proffer that in reasonable probability the relevant evidence, the urine sample in this instance, has not changed in important respects. In ruling on chain of custody issues the military judge has broad discretion, and his ruling will not be disturbed absent a clear abuse of that discretion.

United States v. *Carrott*, 25 M.J. 823, 824 (A.F.C.M.R. 1988) (citations omitted).

The findings of the military judge, upholding the admission of the challenged evidence in this case, were based on Hall's testimony in response to the following questions from the judge:

> Q. You remember the accused urinating into the wide mouth container?
>
> A. Yes, sir.
>
> Q. You remember putting the cap on that container?
>
> A. Yes, sir.
>
> Q. You remember patting it off?
>
> A. Yes, sir.
>
> Q. And you remember that container—you carrying that container up to where Sergeant Brown was waiting?
>
> A. Yes, sir.
>
> Q. Was the urine specimen that was in that container in any way tampered with or adulterated in any fashion in the time that you had it in your possession?

A. No, sir.

Q. Okay, so the urine specimen is now in the wide mouth container, and do you remember giving it to Sergeant Brown?

A. Yes, sir.

Q. Do you remember observing Sergeant Brown as he was doing the things to the bottle that you testified about earlier?

A. Yes, sir.

Q. Did you keep the specimen in your constant vision while all that was being done?

A. Yes, sir.

Q. And then you initialled the label on that bottle?

A. Yes, sir.

Tr. 566-567. Because the judge's ruling was based on testimony supporting a finding that the urine sample came from petitioner's body, the judge's ruling on the chain of custody issue was not an abuse of discretion. The fact that the witness could not recall the transfer of the urine to the specimen bottle does not change that result. The witness testified that she never lost eye contact with the sample from the time it was provided until the time it was in the specimen bottle. That was sufficient to establish a sound chain of custody for the sample.

2. Petitioner next argues (Pet. 14-17) that the military trial and appellate judges in her case were appointed in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, and that the lack of fixed tenure

for the judges in her case rendered the proceedings against her fundamentally unfair. Those questions, however, were resolved in *Weiss* v. *United States*, No. 92-1482 (Jan. 19, 1994), where the Court rejected the arguments petitioner makes here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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Colonel, USAF
JULES D. SILBERBERG
Major, USAF
Appellate Government Counsel
Government Trial and
Appellate Counsel Division

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